UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of VERIZON NEW ENGLAND, INC., Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2324, AFL-CIO, Charging Party.	**Cases 01-CA-044539** **01-CA-044556** **01-CA-044612** **ALJD(NY) – 43-11**

CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Now comes the Charging Party, the International Brotherhood of Electrical Workers, Local 2324, AFL-CIO (the "Charging Party"), pursuant to section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), 29 U.S.C. § 102.46, and hereby files these exceptions to the decision of the Administrative Law Judge ("ALJ) in the above-referenced matter, together with appropriate citation of authorities and argument in support of its exceptions. For the reasons asserted herein and those asserted by Counsel for the Acting General Counsel, the Charging Party respectfully requests that the Board reverse the decision of the ALJ; find that the Respondent, Verizon New England, Inc. (the "Respondent"), has violated section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 158(a)(1), as alleged by the Charging Party in its charge and by the Acting General Counsel in his Complaint; and issue and appropriate remedial order.

STATEMENT OF EXCEPTIONS

Exception 1: The Administrative Law Judge erred in deferring to the decision of the arbitration panel because the panel's decision is clearly repugnant to the purposes and policies of the Act. [ALJD at 10:26 - 11:8, 11:17-18.]

Exception 2: The Administrative Law Judge erred in relying on the standards for deferral set out in *Olin Corp.*, 268 NLRB 573 (1984), because such standards fail to adequately safeguard employees' statutory rights. [ALJD at 6:48 - 11:8, 11:17-18.]

STATEMENT OF THE CASE

The Charging Party does not except to any of the factual findings of the Administrative Law Judge (ALJ). All of the facts relevant to this case and to the exceptions made herein are set

forth in the ALJ Decision ("ALJD") or in the parties' stipulations, together with the attachments thereto. The facts are summarized here in exceedingly brief fashion for the convenience of the Board.

The Charging Party, together with a number of other IBEW Locals, were parties to a collective bargaining agreement with Verizon that expired on August 2, 2008. [ALJD at 2, Stip. ¶ 6; Jt. Ex. 2.] The contract contained a provision in which the Charging Party agreed not to engage in "picketing of any of the Company's premises." [ALJD at 2; Jt. Ex. 2.] The term "picketing" is not defined anywhere in the agreement. [Jt. Ex. 2] Despite this prohibitive language, the Charging Party has engaged in ambulatory informational picketing at or near the Respondent's premises for many years, particularly around the time of contract expirations. [ALJD at 2:22-23; Stip. ¶¶ 7 & 8.]

On April 24 and 25, 2008, the Charging Party began engaging in informational picketing at or near Verizon's facilities in Springfield, Hatfield, and Westfield, Massachusetts, using signs that stated language to the effect of: "Verizon, Honor Our Existing Contract."[1] [ALJD at 2:46-49, 3:10-12, 3:26-29; Stip. ¶¶ 9, 11-13; Jt. Ex. 3.] At each of these locations, in the weeks ***prior to*** the start of the informational picketing, employees placed these same signs in their personal vehicles parked on the Respondent's property while they performed their work at off-site locations. [ALJD at 2-3; Stip. ¶¶ 4, 11-13.] Soon after the employees started placing these signs in their vehicles, and in all instances ***prior to*** the beginning of any ambulatory informational

[1] On page 2 of his decision, the ALJ held that "the Union [which he defined to mean the Charging Party] began engaging in informational picketing at some of Respondent's facilities in Massachusetts" in March 2008. [ALJD at 2:26-28.] While there is vague testimonial evidence in the arbitration transcript that informational picketing began around that time, [Jt. Ex. 9 at 64:7-10], the ALJ specifically found, and the parties' stipulations confirm, that informational picketing ***did not begin*** at the three relevant facilities until late April – well after the events at issue in this case.

picketing with these signs at the locations in question, management instructed employees to remove these signs from their vehicles under threat of discipline. [ALJD at 2-3; Stip. ¶¶ 11-13.] All employees complied with management's instructions, and none was disciplined. [*Id.*]

The Charging Party filed the three instant unfair labor practice charges in March and April 2008, alleging that Verizon violated section 8(a)(1) of the Act by interfering with employees' rights to engage in protected concerted activity by forbidding them from displaying the signs in their cars. [ALJD at 1; Jt. Ex. 1(a), 1(b), 1(c).] Over the Charging Party's objection, on May 21 and June 18, 2008, the Regional Director deferred the cases to the parties' contractual grievance and arbitration process. [ALJD at 3:38-40; Stip. ¶¶ 16 & 17.] The matter was heard by a tri-partite Board of Arbitration, which held, over a strong dissent from the Charging Party panel member, that the placing of signs in the employees' cars amounted to picketing in violation of Article G10 of the contract.[2] [Jt. Ex. 13 at 12.] As relates to the decision regarding picketing, the panel's award did not cite to any bargaining history or any extrinsic evidence outside of the plain language of Article G10. [*Id.*] Indeed, the only support for the arbitration panel's determination came from a management-oriented article from 1897 entitled "The Case *Against* Picketing" (emphasis added), with an unexplained referenced a labor dictionary from *1949*. [*Id.*] The decision cited to no modern treatises dealing with industrial or labor relations and it failed to discuss or cite any relevant Board or court case law, despite the fact that the Charging Party cited extensively to such precedents. [*Id.*; *see also* Jt. Ex. 10.]

On August 27, 2010, the Region initially deferred to the arbitration award and dismissed the charges; however, on February 14, 2011, the Region issued a letter indicating its final

[2] The arbitration panel determined that it did not have the authority to resolve the question as to whether Respondent's actions violated the employees' Section 7 rights as alleged in the unfair labor practice charges. [Jt. Ex. 13 at 13.]

determination that deferral was not appropriate. [ALJD at 4-6; Stip. ¶¶ 22 & 23.] Thereafter, on June 2, 2011, the General Counsel directed the Region to issue complaint in these consolidated cases, absent settlement. [ALJD at 6:39-44; Stip.¶ 24.] The Consolidated Complaint issued on June 30, 2011, alleging that the Respondent violated Section 8(a)(1) of the Act as the Charging Party alleged. [ALJD at 1; Jt. Ex. 1(g).]

The case was presented on a stipulated record to ALJ Joel P. Biblowitz. On or about November 15, 2011, the ALJ issued a decision recommending that the Consolidated Complaint be dismissed in deference to the arbitration award under the deferral standards set forth in *Olin Corp.*, 268 NLRB 573 (1984). [*See* ALJD at 6-11.]

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge erred in deferring to the decision of the arbitration panel, which decision is clearly repugnant to the purposes and policies of the Act.
2. Whether the Administrative Law Judge erred in relying on the standards for deferral set out in *Olin Corp.*, 268 NLRB 573 (1984), which standards fail to adequately safeguard employees' statutory rights.

ARGUMENT[3]

I. THE ADMINISTRATIVE LAW JUDGE ERRED IN DEFERRING TO THE DECISION OF THE ARBITRATION PANEL, BECAUSE SUCH DECISION IS CLEARLY REPUGNANT TO THE PURPOSES AND POLICIES OF THE ACT.

It is axiomatic that section 7 protects an employee's right to engage in concerted communication with coworkers and the public regarding his or her conditions of employment,

[3] The Charging Party hereby incorporates by reference the arguments made in its brief to the Administrative Law Judge. [Brief of the Charging Party at 3-19.]

even on the employer's premises, provided that such communication does not disrupt the employer's operations. *See, e.g., Firestone Tire,* 238 NLRB 1323 (1978). It is equally well settled that a union may waive the employees' rights to engage in such protected section 7 communication, and in particular the right to engage in picketing activity at the employer's premises, provided such wavier is ***clear and unmistakable***. *See, e.g., Metropolitan Edison Co.*, 460 U.S. 693 (1983); *Magnavox Co. v. NLRB*, 415 U.S. 325 (1974); *Engelhard Corp. v. NLRB*, 437 F.3d 374 (3d Cir. 2006); *Silver State Disposal Serv., Inc.*, 326 NLRB 84 (1998); *110 Greenwich Street Corp.*, 319 NLRB 331 (1995). The sole question on appeal to the Board is whether the ALJ erred in deferring to the decision of the arbitration panel despite the fact that the panel failed to apply any accepted definition of picketing and despite the fact that the panel completely ignored the legal standard that any waiver of rights be clear and unmistakable. Ultimately, because the arbitration panel inexplicably ran roughshod over the employees' protected section 7 rights, the panel's decision is repugnant to the Act and cannot be deferred to even under the outdated *Spielberg/Olin*[4] deferral standards.

A. The *Spielberg/Olin* Deferral Standard.

In determining whether to defer to an arbitration award under the *Spielberg/Olin* doctrine, the Board has routinely considered four factors: (1) whether the arbitration proceedings were fair and regular; (2) whether all parties agreed to be bound; (3) whether the arbitrator "considered" the unfair labor practice issue, in that the contractual issue was "factually parallel" to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice charge; and (4) whether the resulting decision was not "clearly repugnant" to the purposes and policies of the Act. *Bethenergy Mines Inc.,* 308 NLRB

[4] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).

1242, 1244 (1992); *Olin Corp.*, 268 NLRB at 573-574 (1984), *citing and clarifying Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The Board should weigh any differences between contractual and statutory standards of review in determining if an award is "clearly repugnant." *Olin Corp.*, 268 NLRB at 574. In addition, the Board should not defer to an award that is "palpably wrong" — i.e., an award that is not susceptible to an interpretation consistent with the purposes and policies of the Act. *Id.; see also 110 Greenwich Street Corp.*, 319 NLRB 331 (refusing to defer to an arbitrator's award upholding the termination of an employee who posted a sign in his car window because such award was repugnant to the employee's protected section 7 rights).

B. The Arbitrator's Decision Is Clearly Repugnant To the Act Because the Board of Arbitration Failed to Apply the Required Clear-and-Unmistakable-Waiver Standard in Concluding That the Charging Party Waived the Employees' Right to Engage in This Protected Activity.

Because the employees' conduct in this case – i.e., placing signs in their car windows – clearly was protected concerted activity within the meaning of the Act, *see, e.g., 110 Greenwich Street Corp.*, 319 NLRB 331, the *only* way for the Respondent to avoid being in violation of the Act would be if the Charging Party had ***clearly and unmistakably*** waived the employees' Section 7 rights through negotiations. *See, e.g., Silver State Disposal Serv., Inc.*, 326 NLRB 84 (1998); *110 Greenwich Street Corp.*, 319 NLRB 331. Indeed, the Supreme Court has stated in no uncertain terms that the intent to waive a statutorily protected right will not *be* inferred from a general contractual provision unless it is *expressly* stated. *Metropolitan Edison Co.*, 460 U.S. 693; *Magnavox Co.*, 415 U.S. 325; *see also U.S. Steel Corp.*, 223 NLRB 1246, 1247 (1976) (deferral is dependent on the express language of the contract and as there was no provision relating to the distribution of Section 7 literature deferral was inappropriate). Moreover, any such express waiver language contained in a contract is not to be read expansively. *See Engelhard Corp.*, 437 F.3d at 378, 379 (internal citations omitted). Thus, the bar for finding a

waiver of a statutory right is very high indeed. *See id*. The Supreme Court has recently further reinforced the requirement that a waiver must be clear and unmistakable when analyzing statutory rights in union negotiated agreements. *See 14 Penn Plaza, LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009) ("*Pyett*"). In *Pyett*, the Court premised its decision on the arbitrator applying *statutory* as well as *contractual* norms. *See id.* at 1471. Thus, if an arbitrator fails to apply appropriate statutory rights and applicable law, then deferral would be contraindicated.

In this matter, the *unfair labor practice* issue relates to concerted activity long recognized as protected under Section 7 of the Act – i.e., the right to engage in union-related communications on non-work time in non-work areas. The *contractual* issue relates to whether the Charging Party waived employees' rights to engage in that protected activity such that the *contract* allowed the Respondent to demand removal of the union signs. Since the protected concerted activity of *picketing* was the only discernible right waived by the Charging Party in the contract, the arbitration panel attempted to shoehorn the display of union signs at issue here under the rubric of picketing. However, had the arbitration panel applied the clear and unmistakable waiver standard, it could not have found the mere display of signs to be picketing under the contract, and the panel's decision thus flies in the face of *Pyett* and prior precedent. *See Pyett*, *Metropolitan Edison Co.*, *Magnavox Co.*, *U.S. Steel Corp. supra*.[5]

Had the arbitration panel applied the correct waiver standard, it would have been required to do much more than it did to determine whether, by agreeing not to *picket* the employer's premises, the Charging Party also intended to waive the employees' right to place signs in their

[5] The arbitration decision also establishes a slippery slope regarding the infringement of employees' section 7 rights: If all communication is picketing, as the arbitration panel seems to assert, then employees would not be allowed to put union bumper stickers on their cars or wear union hats, pins, or T-shirts just because there is a negotiated no-*strike* provision. The clear and unmistakable waiver standard exists in part to protect against such ludicrous results.

vehicles on the employer's premises – an activity not clearly and unmistakably linked to the concept of "picketing." Unfortunately, in this matter, the arbitration panel failed to apply even the most basic and fundamental standards of interpretation to support its conclusion that the display of union signs in unattended cars is "picketing" under the contract, and it certainly failed to establish that the Charging Party intended to waive the ancillary conduct at issue when agreeing to waive the employees' right to *picket* the employer's premises.

In interpreting the parties' intent in negotiating this provision (which would ultimately have come closer to answering whether the Charging Party actually intended to waive statutory rights), the arbitration panel should have applied the well-established and fundamental principles of contract interpretation, such as relying on the plain language of a contract provision, drawing on inferences from the contract as a whole, or examining extrinsic evidence such as bargaining history. *See, e.g.*, *Engelhard Corp.*, 342 NLRB 46, 48 (2004), *enf'd* 437 F.3d 374 (3d Cir. 2006); *Silver State Disposal Serv., Inc.*, 326 NLRB 84, 86 (1998); *see also Chevron, U.S.A.*, 296 NLRB 526, 531 (1989) (refusing to defer to arbitration decision that "did not conform to any of the competing 'modes of analysis' advanced by the Board or the courts"); Elkouri & Elkouri, *How Arbitration Works* 434-35, 462, 463 (6th ed. 2003). However, the arbitration panel failed to apply any of these interpretive aids and thus failed to come anywhere close to establishing that the Charging Party intended the no-strike clause to prohibit the conduct at issue here.

Nor did the arbitration panel review or cite to a single Board or court decision relating to picketing — i.e., decisions that may have informed the Charging Party's thought process in agreeing to the restriction on picketing in the CBA. In this regard, while picketing may not be limited to a "sign on a stick," as the panel noted, one essential feature of picketing long found throughout Board and court decisions is *confrontation* between union members and the subject

employees, customers, or suppliers. *See Carpenters & Joiners of Am., Local Union No. 1506 (Eliason & Knuth of Az., Inc.)*, 355 NLRB No. 159 (2010); *Chicago Typographical Union No. 16*, 151 NLRB 1666, 1669 (1965); *see also United Food and Commercial Workers Union, Local 5*, 32-CP-490, Advice Memorandum, January 28, 2008 ("*UFCW, Local 5*"). Consequently, in those rare cases where the Board has found that stationary signs or banners constituted picketing, an important element of the Board's determination was that union members were also present. *See, e.g.*, *Laborers Eastern Region Organizing Fund*, 346 NLRB 1251, 1251 n. 5 (2006) (the essential feature of picketing is the posting of individuals at entrances to a place of work); *Mine Workers Dist. 2*, 334 NLRB 677, 686 (2001); *see also Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO*, 491 F.3d 429, 437-38 (D.C. Cir. 2007); *Overstreet v. United Bhd. of Carpenters, Local No.* 1506, 409 F.3d 1199, 1213 (9th Cir. 2005); *Gold v. Mid-Atlantic Reg'l Council of Carpenters*, 407 F. Supp. 2d 719, 726 (D. Md. 2005). It is therefore clear that the arbitration panel did not use appropriate means to determine the scope of the word picketing in the contract, as the panel's conclusion is in direct conflict with established Board and court precedent defining picketing.[6]

[6] Moreover, "where an arbitrator's award clearly ignores a long line of Board and court precedent, the Board's refusal to defer to the award under Spielberg is proper." *NLRB v. Gould, Inc.*, 638 F.2d 159, 166 (10th Cir. 1980) (finding that arbitrator *assumed* general no strike clause included a waiver of right to engage in sympathy strike despite lack of extrinsic evidence to support the conclusion); *see also Mobil Exploration & Producing U.S., Inc., v. NLRB*, 200 F.3d 230, 245-46 (5th Cir. 1999) (upholding the Board's decision not to defer where arbitration decision fails to protect employees' statutory rights due to a misinterpretation or misapplication of the principles and policies of the Act); *NLRB v. Owners Maintenance Corp.*, 581 F.2d 44, 49 (2d Cir. 1978) (holding that the Board was not required to "indulge [the arbitrator's] speculation" where evidence did not justify it); *110 Greenwich Street Corp.*, 319 NLRB at *7 (affirming decision not to defer to arbitrator's "misguided" decision that displaying placards was picketing under the contract); *Chevron, U.S.A.*, 296 NLRB at 531; *John Morrell & Co.*, 270 NLRB 1 (1984), *aff'd* 770 F.2d 1400 (6th Cir. 1985).

In sum, the arbitration award upon which the Respondent relied and to which the ALJ deferred blatantly ignored all prevailing Board and court case law and instead read the general term "picketing" expansively to encompass any means employees could take "to inform the public of the Union's concerns." *See NLRB v. Gould, Inc.*, 638 F.2d 159, 166 (10th Cir. 1980). Such a decision, impacting both statutory and constitutional rights, cannot withstand scrutiny and must not be deferred to by the Board, as it is not susceptible to an interpretation consistent with the employees' rights under Section 7. *See id.*; *Mobil Exploration & Producing U.S., Inc., v. NLRB*, 200 F.3d 230, 245-46 (5th Cir. 1999); *110 Greenwich Street Corp.*, 319 NLRB at *7; Office of General Counsel, Advice Memorandum, *WJBK-TV (Storer Comm'n, Inc.)*, June 29, 1988. The arbitration decision therefore is "palpably wrong" and clearly repugnant to the Act. *Olin*, 268 NLRB at 574. Accordingly, the Board must not defer to this award but rather must sustain the complaint, find a violation of the Act as alleged, and order that the Respondent cease and desist from its unlawful conduct and post an appropriate notice to all employees.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN IN RELYING ON THE STANDARDS FOR DEFERRAL SET OUT IN *OLIN CORP.*, 268 NLRB 573 (1984), BECAUSE SUCH STANDARDS FAIL TO ADEQUATELY SAFEGUARD EMPLOYEES' STATUTORY RIGHTS.

On January 20, 2011, the Acting General Counsel issued Advice Memorandum 11-05, in which he explained why the deferral standards set forth in *Spielberg* and clarified in *Olin* were no longer appropriate or lawful in light of the decades of precedent calling into question those standards and the failure of those standards to safeguard employees' statutory rights.

As has been set forth in that Advice Memorandum and as has been forcefully argued in this case by Counsel for the Acting General Counsel, the Board must take this opportunity to modify and clarify its deferral standard to vouchsafe employees' statutory rights based on the

precepts set forth in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), and *Pyett*.[7] For the reasons set forth by the Acting General Counsel in the Advice Memorandum and argued by his Counsel in this proceeding, the Board should adopt the standard espoused by the Acting General Counsel and, in applying those standards to the case at bar, must hold that deferral to the award of the arbitration panel here is not appropriate. In so doing, the Board must overturn the decision of the ALJ, conclude that the Respondent has violated the Act as alleged, and order an appropriate remedy.

CONCLUSION

For the reasons set forth herein, as well as for the reasons set forth in the briefs to the Administrative Law Judge filed by the Charging Party and Counsel for the Acting General Counsel, the Charging Party respectfully requests that the Board reverse the decision of the Administrative Law Judge and issue a decision and order finding that that the Respondent has violated Section 8(a)(1) of the Act as alleged by the Charging Party in its unfair labor practice charges and as charged by the Acting General Counsel in his Consolidated Complaint. As a remedy for the violation, the Charging Party respectfully requests that the Board order the Respondent to cease and desist from its unlawful conduct as described in the Complaint and disseminate an appropriate notice to all employees covered by this collective bargaining agreement by all means the Respondent normally uses to communicate with its employees, including posted notices, electronic mail, and other forms of electronic dissemination typically employed by the Respondent.

Respectfully submitted,

[7] The Charging Party defers to the arguments made by Counsel for the Acting General Counsel and incorporates them herein.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2324,
by its attorneys,

/s/ Alfred Gordon
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Dated: December 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a true and correct copy of the above document was served by electronic mail on Counsel for the General Counsel, Daniel Fein, at Daniel.Fein@nlrb.gov; on Regional Director Rosemary Pye at Region1@nlrb.gov; and on Counsel for the Respondent, Arthur Telegen and John Duke of Seyfarth Shaw, LLP, at atelegen@seyfarth.com and jduke@seyfarth.com, respectively.

/s/ Alfred Gordon